UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRD REGION

ADT LLC D/B/A ADT SECURITY SERVICES

and **Cases 03-CA-184936**
03-CA-192545

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 43

GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Pursuant to Section 102.46(d)(1) of the Board's Rules and Regulations, Counsel for the General Counsel (General Counsel) submits this Answering Brief in response to ADT LLC d/b/a ADT Security Services (Respondent's) Exceptions to the Decision of Administrative Law Judge Michael Rosas (ALJ), dated August 4, 2017, in the above-captioned cases. Under separate cover, General Counsel also files with the Board on this date a Cross-Exception and a supporting brief. It is respectfully submitted that in all respects, other than what is excepted to in the General Counsel's limited Cross-Exception, the findings of the ALJ are appropriate, proper, and fully supported by the credible record evidence.

I. PRELIMINARY STATEMENT

The ALJ found Respondent committed multiple unfair labor practices. Specifically, the ALJ concluded that Respondent violated Section 8(a)(1) and (5) of the Act by changing the terms and conditions of employment of the Albany Unit by imposing a six-day workweek for service and installation technicians at that location, by changing the terms and conditions of employment of the Syracuse Unit by imposing a bi-weekly six-day workweek for the service

technicians in that location, and by unilaterally imposing a bi-weekly six-day workweek for the installation technicians in the Syracuse Unit without first giving the Union notice and an opportunity to bargain. (ALJD 9:14-9:18; ALJD 10:14-10:17). [1] The ALJ also concluded that Respondent violated Section 8(d) and Section 8(a)(1) and (5) of the Act and provided a remedy for the violation. (ALJD 12:8-12:18; 13:6-13:14).

The ALJ also found that Respondent violated Section 8(a)(1) and (5) of the Act when it unilaterally created exceptions to the workweek policy for the Albany Unit and engaged in direct dealing with employees regarding mandatory terms and conditions of employment. (ALJD 10:9-10:17). Finally, the ALJ found that Respondent violated Section 8(a)(1) and (5) of the Act when it delayed in providing information to the Union necessary and relevant to its role as the employee's bargaining representative. (ALJD 11:39-11:41).

II. ARGUMENT

a. The ALJ properly found that Respondent violated Section 8(a)(1) and (5) of the Act by implementing a mandatory six-day workweek for the Albany and Syracuse Units, since the change was a material, substantial, and significant change to terms and conditions of employment of bargaining unit employees. (Respondent's Exceptions 1 and 2)

Respondent excepts to the ALJ's determination that it violated Section 8(a)(1) and (5) of the Act by unilaterally changing employees terms and conditions of employment. Respondent argues that the ALJ should have applied the 'sound arguable basis' standard to the question of whether Respondent unilaterally changed employees' work schedules. However, the Board does not evaluate unilateral changes under the sound arguable basis standard. In *Bath Iron Works*, 345

[1] References to the ALJ's Decision are designated (ALJD _:_) for Administrative Law Judge's Decision at page(s):line(s). References to the transcript are designated (Tr. _), references to Joint Exhibits as (J. Ex. _), references to General Counsel Exhibits as (GC Ex. _), and references to Union exhibits as (U. Ex. _).

NLRB 499 (2005), the Board distinguished between an 8(a)(5) allegation, where the standard would be whether a union waived its right to bargain over an employer's unilateral change to an existing term or condition of employment, and an 8(d) allegation, where the standard would be whether an employer had a sound arguable basis for making a midterm modification to a collective-bargaining agreement. The Board in *Bath Iron Works* held:

> [W]here, as here, the General Counsel's sole allegation is the allegation of unlawful modification of the contracts within the meaning of Section 8(d), the Board is limited to determining whether the employer has altered the terms of a contract without the consent of the other party.

345 NLRB at 501. By contrast, in this case, the General Counsel alleged that Respondent violated both Section 8(a)(1) and (5) and Section 8(d) when it implemented the mandatory six-day workweek for service and installation employees in the Albany unit and service employees in the Syracuse unit. Therefore, the ALJ was correct in undertaking an analysis of whether Respondent violated Section 8(a)(1) and (5) when it made unilateral changes to employees terms and conditions of employment.

It is well-settled that "an employer violates Section 8(a)(1) and (5) of the Act by unilaterally changing terms and conditions of employment without providing [the union] with a meaningful opportunity to bargain about the changes." *Lauren Mfg. Co.*, 270 NLRB 1307, 1308 (1984) citing *NLRB v. Katz*, 369 U.S. 736 (1962). Further, a work schedule is a mandatory subject of bargaining. *Pepsi-Cola Bottling Co. of Fayetteville, Inc.*, 330 NLRB 900, 902 fn. 19 (2000), citing *Our Lady of Lourdes Health Center*, 306 NLRB 337, 339 (1992); see also *Hedison Mfg. Co.*, 260 NLRB 590, 592-94 (1982).

The Board has held that if notice is given too short a time before implementation to allow bargaining, or the employer "has no intention of changing its mind," the notice is nothing more

than informing the union of a *fait accompli* and the employer has failed to provide adequate notice. *Lenawee Stamping Corp.*, 365 NLRB No. 97, slip op. at 9 (June 14, 2017), citing *Ciba-Geigy Pharmaceuticals Division,* 264 NLRB 1013 (1982). Respondent does not argue that it gave the Union adequate notice of its intent to change employees' work schedules by implementing a six-day workweek; nor could it. Respondent admits in its Brief in Support of Exceptions, and the record makes clear, that it told employees about the impending change to their work schedules before it told the Union. (Tr. 25, 118; J. Ex. 1, 4). As soon as the Union became aware of the impending change, it contacted Respondent and demanded that it rescind the change. Respondent refused. The Union also demanded to bargain over the change. Once again, Respondent refused. (Tr. 25-26; J. Ex. 6).

An employer seeking to justify a unilateral change must show that the union waived its right to bargain. That waiver must be "clear and unmistakable*." Provena St. Joseph Medical Center*, 350 NLRB 808, 811-812 (2007). Respondent put forth no evidence that the Union waived its right to bargain over the unilateral change to the employees' work week, because there is no such evidence. The Union repeatedly expressed its opposition to the implementation of the changes. As soon as the Union was informed of Respondent's *fait accompli*, union president Patrick Costello called Respondent's regional human resources manager Michael Stewart to demand that Respondent rescind the change. Stewart told Costello outright that Respondent would do no such thing. (Tr.25). Nevertheless, the Union persisted. Costello included in his September 19 information request another request for Respondent to rescind the change. (J. Ex. 6). This request was ignored.

Respondent cites *Westinghouse Elec. Corp.*, 313 NLRB 452 (1993) to support its contention that the ALJ erred in not applying the sound arguable basis standard. However, that

case actually undermines Respondent's argument. In *Westinghouse*, the union and employer had different interpretations of a clause in the collective-bargaining agreement. The clause had been in several iterations of the CBA, and the employer had consistently applied it in a way the union thought was incorrect. The ALJ found, and the Board agreed, that the employer had not made a unilateral change because it had simply continued its past practice of applying an interpretation of the collective-bargaining agreement that the union did not agree with.

The facts of *Westinghouse* are far from analogous with the instant case. Here, the parties had, until Respondent's unlawful changes, agreed that the collective-bargaining agreements allowed for four- or five-day workweeks. (Tr. 22-23). Union president Costello's testimony was undisputed that in previous instances when Respondent needed employees to work overtime, it would contact the Union and inform it of the amount of necessary overtime. Then the Union would work with Respondent to secure the requisite number of volunteers. (Tr. 54). If that practice did not produce enough volunteers to do the work, Respondent would assign overtime in order of reverse seniority as outlined in the collective-bargaining agreements. (J. Ex. 2, p. 7-8, 3, p. 10-11). That is not what Respondent did in this instance. Instead, it deviated from the parties' past practice and unilaterally changed the workweek to six days, for an indefinite period. (Tr. 84).

This case is analogous to *Gaska Tape, Inc.*, 241 NLRB 686 (1979). There, the Board upheld the ALJ who found that the employer had violated Section 8(a)(1) and (5) of the Act by unilaterally requiring all employees to work a 6-day week including a Saturday shift. In that case, the ALJ first addressed the issue of whether the requirement of Saturday work was a condition of employment. Because the employer had previously relied on volunteers to work Saturday before deciding to make Saturdays mandatory, the ALJ found, and the Board agreed,

that requiring employees to work on Saturdays constituted a change in conditions of employment. Next, the ALJ found that the respondent had not shown that the union waived the right to bargain over the changes, and therefore that the respondent had violated Section 8(a)(5) of the Act by unilaterally changing hours of work. Similarly, here, Respondent unilaterally required all employees to work a 6-day week that included a Saturday shift. Before, Respondent worked with the Union to find an adequate number of volunteers for necessary overtime work. And in this case as in *Gaska Tape*, Respondent has not proffered any evidence that the Union waived its right to bargain over this unilateral change.

Respondent also excepts to the ALJ's finding that changing employee work schedules constituted a material, substantial, and significant change to employees' terms and conditions of employment. Although Respondent relies heavily on the fact that the mandatory six-day schedule was only temporary, that does not make it lawful. Changing the days of the week an employee is required to work is a material change to the employee's working conditions. In this case, it was a significant enough change to impact employee Sopok's child custody arrangements. The ALJ correctly noted that "the Board has long held changes similar to ADT's unilateral changes in a six-day workweek as material and significant." (ALJD 8:36-8:37). The ALJ cited *Fall River Savings Bank*, where the Board found that a change from a five-day to a six-day workweek was a material and significant change to employee working conditions. 260 NLRB 911 (1982).

The ALJ used the appropriate legal standard to determine that Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally changing employees' work schedules. Further, the ALJ correctly found that changing employee work schedules from a five-day workweek to a six-day workweek was a material, substantial, and significant change to their terms and

conditions of employment. Contrary to Respondent's assertion, the ALJ's finding was supported by the weight of record evidence. Accordingly, Respondent's Exceptions 1 and 2 should be dismissed.

b. The ALJ properly found that Respondent engaged in unlawful direct dealing and effectively undermined unit members' confidence in the Union by granting a unit employee an exception that could plausibly be interpreted as favorable treatment. (Respondent's Exceptions 3 and 4)

Respondent excepts to the ALJ's finding that it dealt directly with employee Michael Sopok when it granted him an exception to the mandatory six-day workweek. Contrary to Respondent's assertions, there need be no quid pro quo, direct threat of reprisal, or offer of promise for an employer to engage in unlawful direct dealing. The Board will find a direct dealing violation where 1) the employer communicated directly with union-represented employees; 2) the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the union's role in bargaining; and 3) such communication was made to the exclusion of the union. *Mercy Hospital*, 358 NLRB 566, 567 (2012), citing *Permanente Medical Group*, 332 NLRB 1143, 1144 (2000).

The record demonstrates, and the ALJ was correct in finding, that Respondent dealt directly with Sopok. (ALJD 10:9-10:17). While Sopok mentioned to union steward Dave Madsen that he was unhappy about the six-day workweek, he did not ask Madsen to talk to Respondent for him, nor would Madsen have had the authority to do so. (Tr. 90). Instead, Sopok went directly to manager Peter Bernard. (Tr. 72-73). Instead of contacting the Union, Bernard instructed Sopok to present a notarized letter to area general manager Michael Kirk explaining that working the six-day workweek would interfere with his custody arrangements. (Tr. 73-75). After Sopok presented the letter to Kirk, Bernard called Sopok and granted him the exception. (Tr. 77-78). At no point did Bernard or Kirk contact union president Costello to discuss granting

an exemption to Sopok. (Tr. 30). In fact, the Union was not aware any such exemption had been granted until after the six-day workweek had gone into effect, when steward Madsen found out from the dispatcher that he was the only person working one Saturday. (Tr. 91).

Respondent contends that the ALJ erred in failing to consider that Sopok approached Respondent about the six-day workweek exception. This contention lacks merit. The Board has consistently found direct dealing violations even where the employee initiated the contact with the employer. *Quickway Transportation, Inc.*, 354 NLRB 560, 611 (2009); *Ken's Building Supplies*, 142 NLRB 235 (1963) (finding a direct dealing violation even though employees initiated meeting with employer over health insurance). The ALJ was correct in not considering the fact that Sopok approached Respondent as dispositive of whether Respondent dealt directly with Sopok.

The ALJ was also correct in finding that "by granting a unit employee member an exception that could plausibly be interpreted as favorable treatment, the Respondent effectively undermined confidence in the Union by the bargaining group." (ALJD 10:11-10:13). Respondent argues that it did not intend to undermine the Union when it dealt directly with employee Michael Sopok about granting him an exception to the six-day workweek. Further, Respondent apparently does not see how granting Sopok an exemption from having to work a six-day workweek could potentially be seen as favorable treatment that would undermine unit members' confidence in the Union. However, as Madsen testified, employees were unhappy about having to work a sixth day – a Saturday – for an indefinite period of time. (Tr. 84, 90). Not only did the implementation of the plan without providing notice or an opportunity to bargain with the Union, and without the Union's consent, imply that the Union was powerless to stop the change, but Respondent's decision to exempt an employee from the six-day workweek without bothering to

consult or even inform the Union sent the message to unit employees that the Union had no power whatsoever to stop Respondent from doing as it pleased.

The ALJ correctly determined that because Respondent communicated directly with Sopok, for the purpose of establishing or changing his hours, and the communication was made to the exclusion of the Union, Respondent dealt directly with Sopok in violation of Section 8(a)(1) and (5) of the Act. Therefore, Respondent's Exceptions 3 and 4 should be dismissed.

c. The ALJ correctly found that Respondent delayed in providing information to the Union that was necessary and relevant to its role as the employees' bargaining representative, and that the delay was prejudicial and hampered the Union's ability to enforce the collective-bargaining agreements. (Respondent's Exceptions 5 and 6)

Respondent excepts to the ALJ's finding that it delayed in providing information necessary to the Union and relevant to its role as employees' bargaining representative. Respondent bases this contention on the assertion that it "engaged the Union in continuous communications regarding the six-day workweek and the Union's related request for information." Not only did Respondent not engage the Union in "continuous" communications regarding the six-day workweek, even if it had done so that would not constitute actually responding to the Union's repeated information requests. "An unreasonable delay in furnishing information is as much a violation of the Act as a refusal to furnish the information at all." *U.S. Postal Service,* 332 NLRB 635, 640 (2000). The Union sent its initial information request on September 19, in light of Respondent's planned implementation of the six-day workweek on September 22. (J. Ex. 5; Tr. 25-26). The information request asked for a variety of information relative to the implementation of the six-day workweek, Respondent's reasoning for doing so, and the application of the change to a six-day workweek on Respondent's represented workforce. Respondent replied on October 6 stating it was working on a response. (J. Ex. 6). On October 13,

it provided the Union with two excel spreadsheets, purportedly showing the service backlogs at Albany and Syracuse that necessitated a six-day workweek. Respondent provided no other information at that time and did not state it would provide any more. Instead, it argued that some of the Union's requests were vague and irrelevant. (J. Ex. 7A-C).

In response to Respondent's contention that its requests were vague and irrelevant, the Union sent letters to Respondent on October 24, clarifying and reiterating its information requests and outlining why each request was relevant and necessary to the Union's ability to represent its members. (J. Ex. 8, 9). Respondent replied on October 31 that it was working on a response and did not contest the relevance or specificity of the information requests. (J. Ex. 10).

Having received no response, the Union sent a follow-up request on November 18, asking Respondent to provide information by November 22. (Tr. 28; J. Ex. 11). When Respondent failed to do so, the Union sent another follow-up email on December 15. (Tr. 29; J. Ex. 14). On December 16, three months after the Union's initial information request and seven weeks after the Union's follow-up request, Respondent provided a response and indicated that no further information would be forthcoming. The Board has consistently found multi-month delays in providing information unreasonable. 360 NLRB at 1126; see also *Pan American Grain Co.*, 343 NLRB 318 (2004) (3-month delay was unreasonable); *Woodland Clinic*, 331 NLRB 735 (2000) (7-week delay unreasonable).

Moreover, Respondent's December 16 response consisted of one three-page document that its own witness testified was possibly not relevant to the information request and which Respondent admits in its Brief in Support of Exceptions "could have been forwarded in October when the Respondent first replied to the Union's September 19 information request." (Tr. 120; J. Ex. 15). In evaluating the reasonableness of an employer's delay in providing information, the

Board analyzes "the complexity and the extent of the information sought, its availability and the difficulty in retrieving the information." *Samaritan Medical Center*, 319 NLRB 392, 398 (1995), citing *USPS*, 308 NLRB 547 (1992). A delay of nearly two months on a single document that Respondent admits it could have sent as part of its initial response is an unlawful delay in providing information.

Respondent also argues that the ALJ erred in finding that its delay in responding to the information request prejudiced the Union. This argument too lacks merit. The Union sent its September 19 information request because of the unlawful change Respondent planned to implement on September 22. By the time Respondent provided its final response to the information request on December 16, it had already ceased the six-day workweek at both the Albany and Syracuse facilities. The Union was, therefore, denied relevant information that it had requested – or even the knowledge of whether such information existed – until after Respondent decided to return to a five-day workweek. The ALJ correctly held that the Union was hampered in its ability to represent unit members and enforce the collective-bargaining agreements on their behalf. In light of the above, Respondent's Exceptions 5 and 6 should be dismissed.

III. CONCLUSION

For all the reasons set forth above, General Counsel respectfully requests that the Board deny Respondent's Exceptions to the Decision of the Administrative Law Judge in their entirety.

DATED at Albany, New York, this 13th day of October, 2017.

Respectfully submitted,

_/s/ Alicia E. Pender_____

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